

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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|-------------------------------------|---|-----------------|
| APPLICATION OF TRANS NATIONAL |) | |
| COMMUNICATIONS, INC. D/B/A MEMBERS' |) | |
| LONG DISTANCE ADVANTAGE FOR A |) | |
| CERTIFICATE OF PUBLIC CONVENIENCE |) | CASE NO. 92-050 |
| AND NECESSITY AS A RESELLER OF |) | |
| TELECOMMUNICATIONS SERVICES WITHIN |) | |
| THE COMMONWEALTH OF KENTUCKY |) | |

O R D E R

This matter arising upon petition of Trans National Communications, Inc. d/b/a Members' Long Distance Advantage ("Trans National") filed February 3, 1992 for confidential protection of Exhibits 4 and 5 to its application for a Certificate of Public Convenience and Necessity on the grounds that the information is of a personal nature exempt from disclosure under KRS 61.878(1)(a), the information is confidential commercial information exempt from disclosure under KRS 61.878(1)(b), the information consists of preliminary drafts, notes, and correspondence exempt under KRS 61.878(1)(g), and disclosure of the information is prohibited by federal law or regulation thereby exempt from disclosure under KRS 61.878(1)(h), and it appearing to this Commission as follows:

Trans National has applied for a Certificate of Public Convenience and Necessity to provide service as a reseller of telecommunications services within this state. As part of its application, Trans National has filed as Exhibit 4 its balance

sheet and as Exhibit 5 its profit and loss statement. By this petition, Trans National seeks to protect these exhibits from public disclosure.

Information filed with the Commission is required by KRS 61.872(1) of the Kentucky Open Records Act to be maintained for public inspection unless specifically exempted by statute. Exemptions from disclosure are provided by KRS 61.878(1). That section of the statute exempts 10 separate categories of information which may be protected as confidential. As grounds for its petition, Trans National relies upon four of these exemptions.

The first exemption relied upon is contained in 61.878(1)(a). That subsection of the statute exempts from disclosure "information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy." Trans National maintains that the exemption is applicable to corporations, and in support of its position, relies upon an opinion of the Attorney General, OAG 90-13, which concluded that the word "person" within the meaning of KRS 61.878(1)(a) includes "bodies politic and corporate" and therefore the exemption applies to corporations as well as to private individuals. While opinions of the Attorney General are entitled to consideration, they are merely advisory and not binding upon this Commission.

The clear purpose of KRS 61.878(1)(a) is to protect the rights of privacy of parties submitting information to a public agency. A comparable exemption is found in the federal Freedom of

Information Act, 5 USC §552(b). Subsection (6) of that section exempts "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." In construing this statute, the court in Simms v. Central Intelligence Agency, 642 F.2d 562, 573 (C.A.D.C. 1980) held that "exemption (6) was developed to protect intimate details of personal and family life, not business judgments and relationships."

The decision in Simms, supra, is in accordance with the law in Kentucky concerning the right of privacy. In Maysville Transit Company v. Ort, 296 Ky. 524, 177 S.W.2d 369, 370 (1943), the court, in commenting upon the right of privacy, noted that the "right is designed primarily to protect the feelings and sensibilities of human beings, rather than to safeguard property, business or other pecuniary interest." Thus, corporations cannot claim the right of privacy in information and seek protection of that information under KRS 61.878(1)(a). Therefore, information submitted by a corporation to a public agency cannot be exempt from disclosure under that subsection.

Trans National also seeks to protect the information as confidential under KRS 61.878(1)(b). That section of the statute protects information filed with a public agency which "if openly disclosed would permit an unfair advantage to competitors of the subject enterprise." To qualify for this exemption, it must be established that disclosure of the information is likely to cause substantial competitive harm to the party from whom the information was obtained. To satisfy this test, the party

claiming confidentiality must demonstrate actual competition and a likelihood of substantial competitive injury if the information is disclosed. Competitive injury occurs when disclosure of the information gives competitors an unfair business advantage.

Trans National, as a reseller of telecommunications services, will operate in a competitive market. Therefore, if disclosure of the information sought to be protected would provide Trans National's competitors an unfair advantage, it would be entitled to protection. However, the information is presented in summary form and does not provide sufficient detail to be of significant competitive value. Therefore, the information is not entitled to protection under KRS 61.878(1)(b).

Another ground relied upon by Trans National is that the information is exempt from disclosure under KRS 61.878(g). That subsection exempts from disclosure "preliminary drafts, notes, and correspondence with private individuals, other than correspondence which is intended to give final action of a public agency." Like the exemption provided KRS 61.878(1)(a), this exemption is limited to private individuals and is not applicable to corporations. Furthermore, by limiting the exemption to preliminary drafts, notes, and correspondence, it is clear that the exemption was not intended to apply to information filed with an agency which becomes part of the record upon which the agency's decision is based. Therefore, the information is not entitled to protection from disclosure under KRS 61.878(1)(g).

Finally, Trans National contends that the information is exempt from disclosure under federal law and thereby exempt from

disclosure under KRS 61.878(1)(h), which exempts from disclosure information which is prohibited by federal law or regulation. Trans National cites no specific provision of federal law prohibiting disclosure of the information sought to be protected, but instead, relies upon the general provision found in the federal Freedom of Information Act and the rules and regulations of the Federal Communications Commission which exempt confidential commercial information. This is the identical exemption provided in KRS 61.878(1)(b) which, as noted above, is not applicable to the information sought to be protected by this petition. Therefore, the information is not entitled to protection under KRS 61.878(1)(h).

This Commission being otherwise sufficiently advised,


IT IS ORDERED that:

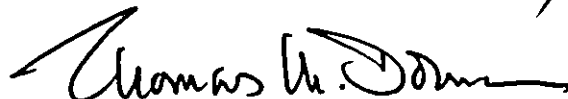
1. The petition to protect as confidential Exhibits 4 and 5 to Trans National's application for a Certificate of Public Convenience and Necessity be and is hereby denied.

2. The information sought to be protected shall be held and retained by this Commission as confidential and shall not be open for public inspection for a period of 20 days from the date of this Order, at the expiration of which it shall be placed in the public record.

Done at Frankfort, Kentucky, this 28th day of February, 1992.

PUBLIC SERVICE COMMISSION


Chairman


Vice Chairman


Commissioner

ATTEST:


Executive Director